

LITIGATING IN THE PROBATE COURT

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INTRODUCTION

Although it is an arm of the district court, litigating practitioners may feel hesitant to file probate contests directly with the probate court. Although there are advantages to both court systems, the probate court provides a unique avenue for litigating probate matters due to its distinctive nature and composition.

THE DISTRICT COURT CHIEF JUDGE AND THE PROBATE COMMISSIONER

Rule 1.30 of the Local Rules of Practice for the Eighth Judicial District Court of the State of Nevada (“EDCR”) states that the Chief Judge must “share and direct responsibility for hearing overflow cases and the probate calendar with all trial judges.”¹ The Chief Judge must also

supervise . . . the administrative business of the court and have general supervision of the attachés of the court. The various commissioners, referees, hearing officers and masters shall report to and be directed by their supervising judge pursuant to local court rule; however, the chief judge will maintain general supervision over all such officers.²

Therefore, in overseeing probate matters, the Probate Commissioner serves as a special master under the authority of the Chief Judge, who, by virtue of his or her designation, is the probate judge.

COMMISSIONER AS SPECIAL MASTER

As a special master of the court, the commissioner acts on behalf of the probate judge.³ The probate commissioner has been given broad ministerial powers in the state of Nevada,⁴ which powers include the subpoena power.⁵ The commissioner typically makes certain findings of fact in his or her report and recommendation, similar to that of the discovery commissioner. The designated party then submits the report and recommendation to the commissioner for the signature of the probate judge.

TREATMENT OF REPORT AND RECOMMENDATION

In a nonjury action, the court accepts the commissioner’s findings of fact unless they are clearly erroneous.⁶ Then, within ten days after being served with notice of the filing of the report and recommendation, any party may then serve written objections thereto upon the other parties.⁷

¹ E. DIST. CT. R. 1.30(3) (2008).

² *Id.* 1.30(7).

³ NEV. R. CIV. P. 53(a)(1) (“The court in which any action is pending may appoint a special master therein. As used in these rules the word “master” includes a referee, an auditor, an examiner and an assessor.”).

⁴ *Id.* 53(c).

⁵ *Id.* 53(d)(2).

⁶ *Id.* 53(e)(2).

⁷ *Id.*

Thereafter, any application to the court for action upon the commissioner's report and recommendation must be accomplished by motion and upon notice as set forth in Nevada Rule of Civil Procedure ("NRCP") 6(d). After hearing, the court may adopt the report, or it may modify or reject the report in whole or in part. The court may also examine additional evidence or may recommit the report with instructions to the parties.⁸

In jury actions, the commissioner is not required to report on the evidence. Instead, the commissioner's findings are admissible as evidence and may be read to the jury, subject to the ruling of the court on any objections to points of law.⁹

If the parties stipulate that the commissioner's report and recommendation are final, only questions of law arising from the report and recommendation may be considered.¹⁰ Therefore, it is vital that any stipulations or objections be raised on the record during the initial proceedings before the commissioner. Normally, one of the parties will be asked by the commissioner to draft the report and recommendation, with the requirement that each party be given the opportunity to review the report prior to its submission to the probate judge.

The Nevada Supreme Court has held that these reports should be adopted by the court unless "the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence."¹¹

ADVANTAGES OF FILING A PETITION IN PROBATE COURT

There are many advantages of filing a petition for probate in the probate court. One significant benefit is that the probate commissioner is uniquely qualified to adjudicate in this area of the law. For example, the probate commissioner's charge is that of analyzing evidence and testamentary documents in order to make a report and recommendation to the probate judge. Therefore, the specificity of this duty gives the commissioner a unique familiarity with the probate process. Furthermore, commissioners are often practitioners who have spent significant time in the probate arena, and often have special training that enables them to understand the complexity of probate and estate taxation issues.

In addition the pre-trial discovery requirements of the probate process are modified under E.D.C.R. 2.31, which mandates that all cases not commenced by the filing of a complaint are exempt from the mandatory pre-trial discovery requirements of N.R.C.P. 16.1. Although a complainant in civil court may file an ex parte application to allow early discovery, no such requirement exists in the probate court. Moreover, under E.D.C.R. 2.55, all cases not commenced by the filing of a complaint are exempt from the entry of a scheduling order pursuant to N.R.C.P. 16.1(b).

The pleading requirements of the probate process are also somewhat relaxed in relation to those of actions filed in district court. In a probate proceeding, a petition is filed and noticed to the opposing party; however, no complaint is filed to commence the probate proceeding.

⁸ *Id.*

⁹ *Id.* 53(e)(3).

¹⁰ *Id.* 53(e)(4).

¹¹ *Russell v. Thompson*, 96 Nev. 830, 834 n.2, 619 P.2d 537, 539-40 n.2 (1980) (citing 9 Wright and Miller, Federal Practice and Procedure: Civil § 2605, and cases cited therein).

Therefore, the pre-trial discovery rules of N.R.C.P. 16.1 do not apply to these cases because they are exempt.¹² Absent a discovery ruling, there is no mandatory requirement to hold an early case conference or to file a case conference report.

Consequently, because of the relaxed discovery requirements, after a petition is filed, subpoenas and depositions can be immediately filed and scheduled.

JURISDICTION OF THE COURT

Nevada courts obtain jurisdiction over trusts through the Nevada Revised Statutes. Specifically, the courts have

exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts, including petitions with respect to a non-testamentary trust for any appropriate relief provided with respect to a testamentary trust.

Under section 164.010(1), upon petition of a trustee, the settlor, or a beneficiary, “the district court of the county in which the trustee resides or conducts business, or in which the trust has been domiciled, shall . . . [have] jurisdiction of the trust as a proceeding in rem.”¹³ This *in rem* distinction is interesting because not only does the court have jurisdiction over the trust itself (*i.e.*, the res), it also has jurisdiction over the trustee through in personam jurisdiction, as well as jurisdiction over any agent to which management or investment duties are delegated.¹⁴

Prior to taking jurisdiction, the court must “consider the application to confirm the appointment of the trustee and specify the manner in which the trustee must qualify.”¹⁵ Once the court obtains jurisdiction over the trust, the court’s jurisdiction continues until the court releases jurisdiction upon petition from the trustee.¹⁶ Additionally, the court having jurisdiction may transfer that jurisdiction, upon petition by the trustee or a beneficiary, to any other district court within Nevada, or to any court outside of Nevada, “when the convenience of beneficiaries, trustees, attorneys or other interested persons makes a transfer desirable.”¹⁷

CONTESTING PROVISIONS OF A TRUST

Although the trustee or the beneficiaries may contest the validity of a trust, the question of whether the challenger will be granted a jury trial in that matter has not been specifically answered by statute. Clearly, Nevada law provides for a jury trial in a will contest.¹⁸ In *Close v. Flanary*, the Nevada Supreme Court held that under most situations, the questions raised by a

¹² See E.D.C.R. 2.31.

¹³ NEV. REV. STAT. § 164.010(1) (2007).

¹⁴ *Id.* § 164.670(4).

¹⁵ *Id.* § 164.010(1).

¹⁶ *Id.* § 153.020.

¹⁷ *Id.* § 164.130.

¹⁸ *Id.* §§ 137.010 – 137.020.

will contestant can be heard and resolved before the court.¹⁹ However, where the issues relate to the validity of the will, or address questions surrounding the execution thereof, parties may request a trial by jury.²⁰

In terms of trusts, it is well settled that a beneficiary may contest a provision within a trust. Although such an action could eventually terminate a beneficiary's interest under the terms of a trust—specifically, as a violation of a no contest clause—the beneficiary is not prohibited from contesting provisions within a trust or a will. In addition, under Nevada law, the good faith exception to the general no contest clause rule states that a beneficiary who, in good faith and with probable cause, challenges a provision within a will or trust, does not violate the provisions of the no contest clause.²¹

Furthermore, the trustee or beneficiary may also petition the court for instructions regarding the internal affairs of the trust.²² The court to which the petition is made will then grant a hearing on the matter,²³ unless the court makes a determination that the dispute should take the form of an action in civil court.²⁴

The Nevada Constitution clearly states that “[t]he right of trial by Jury shall be secured to all and remain inviolate forever.”²⁵ Some courts argue that a trial over the provisions of a trust is purely an equitable matter, and that a court may therefore choose to dispense with the equitable issues before proceeding to the legal issues.²⁶ This argument is countered with the idea that a trust has more in common with a will than with other written instruments—such as contracts—on which equitable claims are generally made, and that because the legislature has granted a statutory right to a jury trial in will contests, and because both wills and trusts are intended testamentary instruments, not granting a jury trial to a petitioner would be incorrect.²⁷ In addition, proponents argue that creating a distinction between jury trials for wills and trusts could lead to situations in which conspiring beneficiaries, trustees, or attorneys could exploit testators while hiding behind the distinction between wills and trusts.²⁸

The New York Surrogates Court endorsed the right to a jury trial in trust litigation, and explained these arguments very succinctly in *In re Estate of Tisdale*. Because their analysis on this subject was so clear and instructive, it is reproduced here in its entirety:

In the context of decedent's estates, the only express statutory grant of a jury trial relates to probate proceedings (SCPA 502 [1]). However, the right to a jury trial also exists by constitutional guarantee for other proceedings that arise in the Surrogate's Court, such as discovery proceedings (a statutory procedure by

¹⁹ *Close v. Flanary (In re Estate of Peterson)*, 75 Nev. 255, 261, 339 P.2d 379, 382 (1959).

²⁰ NEV. REV. STAT. § 137.020(2).

²¹ *Hanaam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 798 (1998) (“We conclude that public policy favors recognition of the implied exception to no-contest clauses for good faith challenges based on probable cause, and now elect to follow the modern trend favoring the exception.”); see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003).

²² See *id.* § 164.015.

²³ *Id.*; *Id.* § 164.030.

²⁴ *Id.* § 164.033.

²⁵ NEV. CONST. art. I, § 3.

²⁶ See *In re Estate of Tisdale*, 655 N.Y.S.2d 809, 811 (N.Y. Sur. Ct. 1997).

²⁷ *Id.*

²⁸ *Id.* at 812.

which a fiduciary may seek to reclaim property on behalf of an estate [Matter of Wilson, 252 NY 155]) and reverse discovery proceedings (a statutory procedure by which a claimant may seek to reclaim property from an estate [Matter of Schneier, 74 AD2d 22]). Furthermore, the constitutional guarantee has historically been construed to extend to proceedings that closely resemble those for which constitutional guarantee is unquestioned (Matter of Wisniewski, 88 Misc 2d 76 [right to jury trial exists for proceeding against fiduciary similar to, but not strictly speaking, a reverse discovery proceeding]). This substantive rather than procedural approach effectuates the principle that the right to a jury depends upon the nature of the relief requested rather than the forum or the label of the proceeding (Matter of Garfield, supra; Matter of Luria, supra).

Although some cases have held that a proceeding to set aside an instrument is equitable in nature and thus not triable by jury (Phoenix Mut. Life Ins. Co. v Conway, 11 NY2d 367; Dykman v United States Life Ins. Co., 176 NY 299), a proceeding to set aside a will may also be characterized as equitable in nature, and, as mentioned, is nonetheless triable by jury in New York (SCPA 502 [1]). However, to consider a revocable trust as a traditional instrument fails to recognize that it actually functions as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property. While alive, a settlor may amend his or her revocable trust (as Mrs. Tisdale did in this case) just as he or she may change his or her will, without resort to the courts for equitable relief. Significantly, judicial proceedings with respect to a revocable trust would occur only after the settlor's death at the instigation of the settlor's distributees, exactly the situation that arises in a will contest. Furthermore, the factual issues presented in such a proceeding are the same as those presented in a proceeding to set aside a will.

Clearly, a revocable trust has little in common with instruments other than wills. Although such trust is established in the form of an "agreement", it is really unilateral in nature because the negotiation that characterizes bilateral instruments is totally absent. The trustee of a revocable trust (if not the settlor) simply acts at the behest of the settlor. If the settlor becomes dissatisfied with the trustee or with the terms of the trust, he or she simply amends the trust to suit his or her desires. There is no need to invoke the equitable powers of the court to relieve the settlor of a bilateral obligation because there is none.

The substantial similarity between revocable trusts and wills (and the illusory concept of a revocable trust as a contract) mandates the conclusion that the nature of the relief requested in a proceeding to set aside a trust is the same as the nature of the relief requested in a proceeding to set aside a will. This alone requires the court to recognize the right to a jury trial in the instant proceeding in order to comply with the above-mentioned long-standing rule that the nature of the relief requested, rather than the forum or the label of the proceeding, determines the right to a jury (Matter of Garfield, supra; Matter of Luria, supra). The relatively recent use of revocable trusts as substitutes for wills explains why this issue was not addressed earlier. As a result, there is uncertainty (see, Matter of Aronoff, supra [with which this court respectfully disagrees]) and therefore legislation on this point is suggested.

It is further observed that a proceeding to set aside a revocable trust is like a discovery proceeding in that the relief sought is recovery of estate assets allegedly wrongfully transferred. Therefore, objectants could have been appointed limited temporary fiduciaries for the purpose of commencing a discovery proceeding against the nominated executor on the ground that such executor could not and would not pursue a claim against himself (SCPA 702 [10]) and in that way they would unquestionably be entitled to a jury trial. Alternatively, objectants could have commenced a reverse discovery proceeding under SCPA 2105 and cited controlling authority recognizing the right of persons interested in the estate to bring a proceeding where the fiduciary is not motivated to do so and to have such proceeding heard by a jury (Matter of Schneier, supra; Matter of Wisniewski, supra). Form would enjoy a great victory over substance if the court distinguished between a proceeding to set aside a decedent's revocable trust and a discovery proceeding, given that the same relief is sought in each, namely recovery of estate assets. Accordingly, to deny the right to a jury trial for such a proceeding might very well be unconstitutional.

Furthermore, indorsing a distinction between wills and revocable trusts for purposes of the right to a jury trial would create a host of unproductive incentives and practical difficulties, particularly in cases such as this one where the will and the trust were executed simultaneously and have the same provisions albeit by incorporation. One such difficulty would be the commencement of separate proceedings for the will and the trust in order to avoid the issue of waiver of the otherwise indisputable right to a jury trial in the will contest (CPLR 4102 [3]). Additionally, the factual questions and the evidence in all likelihood will be almost identical with respect to both instruments, a situation which may effectively allow for only one factual determination, either abrogating the right to a jury trial in the will contest (if the trust dispute is tried first) or resolving the trust dispute by giving effect to the jury's determination in the will contest (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4102:6, at 213). Finally, scheming perpetrators preying on elderly or infirm people could subvert distributees' rights to a jury determination simply by utilizing a revocable trust rather than a will as a vehicle for their misdeeds.²⁹

Equally compelling, however, are the arguments of courts that decline to extend jury trials in trust disputes. For example, in *Walter v. Drayson*, the U.S. District Court for the District of Hawaii held that an action for breach of fiduciary duty in a trust setting was a question of equity. Although the ultimate disposition of the case was not concerned with whether to grant a jury trial, the court, in citing a substantial body of case law, held that "although 'the remedies of the beneficiary of a trust against the trustee have been almost exclusively within the jurisdiction of equity,' a beneficiary may bring a suit for legal damages if the 'trustee is under a duty to pay money immediately to the beneficiary.'"³⁰ However, where the suit is simply for breach of fiduciary duty in the management of a trust, and where there is no money due immediately, the suit must proceed in equity, and without a jury trial.

²⁹ *Id.* at 811-12.

³⁰ *Walter v. Drayson*, No. 06-00568 SOM/KSC, 2007 U.S. Dist. LEXIS 13180, *40-41 (D. Haw. Feb. 23, 2007) (citing *Dixon v. Northwestern Nat'l Bank of Minneapolis*, 297 F. Supp. 485, 489 (D. Minn. 1969)).

This argument has been echoed multiple times in various courts in the United States. The fundamental issue in each of these cases is whether the relief involves a matter of law or equity.³¹ The Arizona Court of Appeals has held that, “there is no right to a jury trial for breach of fiduciary duty cases relating to a trustee’s duties in probate proceedings.”³² The Arizona court based this conclusion on the notions that (1) actions for breach of fiduciary duty are equitable in nature; and (2) the Arizona Constitution does not grant a fundamental right to a jury trial, but provides for equity jurisdiction within the courts.³³ In Nevada, the state Constitution provides for one form of civil actions, encompassing both law and equity.³⁴ Therefore, in Nevada, the matter is less clear.

In *Burton v. Security Pacific National Bank*, the California Court of Appeals held that “there is no right to a jury in a probate proceeding absent that right conferred by statute.”³⁵ The court went on to say that, “while the question of under what circumstances a jury trial can be held in a probate proceeding is an unsettled matter, objections to an account which also raise issues of fact do not entitle one to a jury trial.”³⁶ The court continued by noting that an award of a surcharge against the trustee for a breach of fiduciary duty “is within the power of the court, not a jury.”³⁷

This question appears to have not been specifically addressed by the Nevada courts or legislature.

³¹ See, e.g., *Jefferson Nat’l Bank of Miami Beach v. Cent. Nat’l Bank in Chicago*, 700 F.2d 1143, 1149 (7th Cir. 1983) (citing Restatement (Second) of Trusts § 197 (1959) (“Except as stated in § 198, the remedies of a beneficiary against the trustee are exclusively equitable.”)).

³² *Newman v. Newman (In re Estate of Newman)*, 196 P.3d 863, 877 (Ariz. Ct. App. 2008).

³³ *Id.* at 876.

³⁴ NEV. CONST. art. VI, sec. 14.

³⁵ *Burton v. Sec. Pac. Nat’l Bank*, 202 Cal. Rptr. 848, 854 (Cal. Ct. App. 1984) (citing *Estate of Beach*, 542 P.2d 994 (Cal. 1975)).

³⁶ *Id.*

³⁷ *Id.*